Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

~~78-~~950

No. .....

MISSOURI BOARD OF PROBATION AND PAROLE, CAROLYN V. ATKINS, Chairman, W. R. VERMILLION and DICK MOORE, Members of the Board,

Petitioners,

vs.

JAMES E. WILLIAMS and JUNIOR THEOBALD, Individually and on Behalf of All Other Persons Similarly Situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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MISSOURI BOARD OF PROBATION AND PAROLE, CAROLYN V. ATKINS, Chairman, W. R. VERMILLION and DICK MOORE, Members of the Board,

Petitioners,

vs.

JAMES E. WILLIAMS and JUNIOR THEOBALD, Individually and on Behalf of All Other Persons Similarly Situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, the Missouri State Board of Probation and Parole, Carolyn V. Atkins, Chairman, W. R. Vermillion and Dick Moore, Members, pray for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 27, 1978.

REPORTS OF OPINIONS BELOW

The opinion containing the judgment for which this petition seeks the issuance of the writ of certiorari is not yet published. In the United States Court of Appeals for the Eighth Circuit it was styled and numbered as follows:

> James E. Williams and Junior Theobald, Individually and on behalf of all other persons similarly situated, Appellants, vs. Missouri Board of Probation and Parole, W. R. Vermillion, Chairman, F. N. Sterm and Dick Moore, members of the Board, Appellees. (No. 78-1136, Decided October 27, 1978).

The District Court opinion from which the appeal was taken is styled similarly and is reported at 444 F.Supp. 773 (W.D.Mo. 1978). Copies of the opinions are in Appendices A and B.

GROUNDS OF JURISDICTION

Judgment was entered in the United States Court of Appeals for the Eighth Circuit on October 27, 1978. The issuance of the mandate is stayed until December 17, 1978. There is no order respecting a rehearing[1] nor any order granting an extension of time within which to file this petition. This petition is filed within ninety days of the date of decision. The statutory provision conferring on this court jurisdiction to review the judgment in question is contained in 28 U.S.C., §1254(1).

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1. Neither rehearing nor transfer en banc was requested since a motion requesting the latter proved futile in *Inmates of the Nebraska Penal and Correctional Complex* v. *Greenholtz*, 576 F.2d 1274 (8th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3190 (U.S. October 3, 1978) (No. 78-201), a case involving practically identical issues.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the procedural protections of the Due Process Clause of the Fourteenth Amendment to the United States Constitution apply to parole release determinations made by the Missouri State Board of Probation and Parole concerning inmates committed to the Missouri Division of Corrections.

2. What minimum procedures are implicated by the Due Process Clause, if applicable to such parole release determinations, and especially whether such minimum procedures include the need for Missouri inmates to be informed of adverse information in their parole files.

3. Whether the procedures of the Missouri State Board of Probation and Parole meet the minimum Due Process procedures required by the Due Process Clause.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Amendment Fourteen, United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several states according to their respective

numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any state, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the

United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Sections 549.205, 549.261, 549.285, and 549.291, RSMo 1969, are set forth in Appendix C. Also set forth in Appendix C are the rules and regulations governing the granting of paroles and related procedures as contained in the official publication for State agency rules, which citation is as follows: 13 CSR 80-2.010, 80-2.020, and 80-2.030.

STATEMENT OF FACTS

Preliminary Statement

This petition for writ of certiorari seeks review of the above referenced judgment of the United States Court of Appeals for the Eighth Circuit which reversed the District Court judgment in which the District Court had dismissed plaintiffs' complaint for declaratory judgment and injunctive relief requested under 42 U.S.C. §1983. The complaint was filed on March 19, 1974, and was later certified as a class action pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure. Prior to trial the parties arrived at an extensive stipulation of fact and stipulation of legal issues. The legal issues were whether the procedural Due Process protections of the Fourteenth Amendment were applicable to parole release determination proceedings conducted by the Missouri State Board of Probation and Parole and, if so, what minimum protections were necessary. The case was tried by the Honorable William H. Collinson of the

United States District Court for the Western District of Missouri on August 17 and 18, 1976. On January 17, 1978, the Court held that the procedural protections of the Fourteenth Amendment of the United States Constitution do not adhere to the plaintiffs' interest in the possibility of conditional release on parole and are not mandated by that amendment in relation to proceedings conducted by the Missouri State Board of Probation and Parole and its parole release determinations. The injunctive and declaratory relief sought was denied and judgment was entered in favor of the defendants.

The judgment was appealed by the plaintiffs to the United States Court of Appeals for the Eighth Circuit. In the judgment for which this petition seeks review, that Court reversed the District Court's decision and held that the procedural protections of the Due Process Clause are implicated in the Missouri State Board of Probation and Parole's parole release determinations. The Court also held that in addition to the minimum procedures set out in *Inmates of the Nebraska Penal and Correctional Complex* v. *Greenholtz*, 576 F.2d 1274 (8th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3190 (U.S. October 3, 1978) (No. 78-201), the Board would also be required to reveal to the inmate any information adverse to him which was contained in the Board's file on him. The cause was remanded to the District Court to consider what procedures were due in relation to the Missouri State Board of Probation and Parole.

Parole Release Determination Procedures

A detailed delineation of the operation of the Missouri State Board of Probation and Parole in its determination of whom to release on parole is contained in the District Court's opinion. A more concise statement follows.

The availability of parole to inmates confined in the Missouri Division of Corrections is established by §549.261, RSMo 1969, which provides that inmates will be released on parole when, in the opinion of the Board of Probation and Parole, there is reasonable probability that the prisoner can be released without detriment to the community or to himself. The statute sets forth minimum times in which inmates may make applications for parole and in which they may be given a hearing on that application. Parole is not considered a reduction of sentence or pardon but is to be ordered only in the best interest of society. The Board may place an inmate on parole when it believes he is able and willing to fulfill the obligations of the law abiding citizen. While on parole, the parolee is in the legal custody of the institution from which he was released and is subject to the orders of the Board. The Board referred to is created by §549.285, RSMo 1969, and contains three members appointed by the Director of the Department of Social Services with the approval of the Governor and with the advice and consent of the Senate. During most of the pendency of this lawsuit, W. R. Vermillion was the Chairman of the Board with Ferd Sterm and Dick D. Moore the two Members. During the pendency of the action in the United States Court of Appeals for the Eighth Circuit, Carolyn V. Atkins was appointed a Member and Chairman of the Board with W. R. Vermillion and Dick D. Moore being the remaining two members.

Within thirty days after an inmate has been assigned to an institution within the Division of Corrections, he will receive a written notice informing him of the month and year in which his parole hearing will be held. He will be notified in writing of the exact date forty-five days prior to the hearing. Before his initial hearing the inmate is interviewed by an institutional parole officer who may, at that time, go over matters in the file with the inmate.

The institutional parole officer's pre-parole report summarizes for the Board the matter contained in the files and other information obtained from interviews with other individuals such as personnel in the Division of Corrections who have come into contact with the inmate. The institutional parole officer also evaluates the inmate and makes a recommendation on whether or not he should be released on parole. A hearing is conducted by a three member panel, at least one of which is a parole board member. The others will be parole analysts who help conduct the hearing, make recommendations as to a decision, and draw up a written statement of reasons explaining to the inmate the Board's decision and their reasons therefor. Each member of the hearing panel has a copy of the institutional parole officer's report and also has access to the file which is at the hearing. The file contains such matters as the classification report compiled by the Division of Corrections; pre-sentence report; psychiatric and psychological reports, if available; previous institutional parole officer reports; information from previous periods of supervision by the Board; prison disciplinary reports; information concerning any previous time spent in the Division of Corrections; arrest record; references to juvenile proceedings; material and comments sent in gratuitously by concerned law enforcement officials, friends of the inmate and other citizens. There may also be official and community attitude reports done by the Board's field officers in an effort to determine whether or not an inmate can be paroled to a particular locale.

At the hearing, the inmate is allowed to have a representative with him who may be a lawyer. The representative is allowed to make a presentation at the end of the Board's interview with the inmate and to offer any information or arguments on behalf of the inmate. The inmate is also allowed to have a "delegation", that is, other people

who want to put in a word on his behalf. Normally the inmate is not present when the delegation testifies. People opposed to the parole may also present their views to the Board outside the presence of the inmate. Such a delegation is extremely rare if it ever occurs at all. The proceedings are preserved on tape recordings. After the hearing, a decision is reached on whether to grant parole, put the inmate on parole planning status, deny parole, or set further consideration of the inmate to a later date. If parole is to be granted, the decision must be approved by another member of the Board. If parole is denied or a set back is given, the inmate is given written reasons for that action as prepared by a parole analyst. The reasons are given to the inmate by the institutional parole officer. The inmate may appeal the decision to two members of the Board on the ground that the reasons given for denial or continuance did not support the decision or that there was significant information in existence but not known to the panel at the time of the hearing. The inmate is advised in writing of the appeal decision.

After the initial hearing, an inmate may be set back for a review or another hearing at a later time. A review is exactly the same procedure as described above except that the inmate does not appear before a panel for a hearing. However, persons on his behalf may meet with the Board in their offices and he may send to the Board any information that he feels necessary. He also has the opportunity to communicate with the institutional parole officer when the pre-review interview is being made in order to prepare the pre-review report. Adverse decisions on review may also be appealed in the manner described above.

The rules and regulations of the Board, established under the authority of §549.261, RSMo 1969, are not only

published in the Code of State Regulations (See Appendix C), but also published in booklet form and distributed to the inmates when they arrive in the Division of Corrections. The regulations and booklet fully describe the above procedures as well as other matters of concern to the inmates in relation to their possibility of being paroled. Among other things, the booklet sets out times that initial hearings are held, hearing and review procedures, general criteria for release on parole, the factors which the Board considers, what is expected of the inmate at the parole hearing and the administrative appeal procedure.

The basis for Federal jurisdiction of the Court of the first instance, the United States District Court for the Western District of Missouri, was 28 U.S.C., §§1343(3) and (4), 2201, and 2202. Basis for the jurisdiction in the United States Court of Appeals was 28 U.S.C., §1291.

ARGUMENT

There are two primary Federal questions for which the Writ of Certiorari is sought in this case: Whether Missouri inmates have an interest in parole which is protectible by the Due Process Clause of the Fourteenth Amendment and, if so, what minimal protections are required, especially, whether the inmate is required to be advised of adverse information existent in his parole file. These questions, except for the revelation of adverse information to the inmate, are before this Court in the case of *Inmates of the Nebraska Penal and Correctional Complex* v. *Greenholtz*, No. 78-201, *cert. granted* on October 3, 1978 (47 U.S.L.W. 3190). The fact that this court has issued its writ in that case, concerning practically identical questions, provides strong support for the petitioners' position that the writ should issue to review this case also. It should be noted that there are distinctions between the

two cases as well as points of identity which further strengthen the petitioners' position that the writ should issue. These distinctions will be explained more fully below.

The United States Court of Appeals' decision in the *Williams* case is in conflict with the decisions from other Courts of Appeals, both on the threshold issue of whether Due Process applies to parole release determinations as well as on the issue of whether adverse information need be revealed prior to the parole hearing or review. On the threshold issue, this Court catalogued the conflicting opinions in *Scott* v. *Kentucky Parole Board*, 429 U.S. 60 (1976). In addition, there are the cases of *Brown* v. *Lundgren*, 528 F.2d 1050 (5th Cir. 1976), *cert. denied*, 429 U.S. 917 (1976); *Kelsey* v. *Minnesota*, 565 F.2d 503 (8th Cir. 1977); *Shaw* v. *Briscoe*, 541 F.2d 489, 490 (5th Cir. 1976), *cert. denied*, 430 U.S. 933 (1977); *Ball and Scott* v. *Kentucky Parole Board*, No. 74-1899 (June 7, 1977, 6th Cir.); and, *Dorado* v. *Kerr*, 454 F.2d 892, 897 (9th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972), which hold due process is not applicable.

In regard to the question of whether adverse information need be revealed to the inmate before the parole determination is made, there has been no other Court of Appeals decision which has required this revelation when there has been a statement of reasons given to the inmate after an adverse decision is made. See especially *Franklin* v. *Shields*, 569 F.2d 784 (4th Cir. 1977), *reversed en banc*, 569 F.2d 800 (4th Cir. 1978); *Williams* v. *Ward*, 556 F.2d 1143 (2nd Cir. 1977); *United States ex rel. Richerson* v. *Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976). In addition to providing a written statement of reasons, the Missouri Board also provides an administrative appeal procedure, a ground for which may

be the existence of information previously unknown to the Board.

A further reason for reviewing the decision of the court below is that the Due Process analysis utilized by the Court of Appeals is in conflict with the analysis set out by this Court in *Meachum* v. *Fano*, 427 U.S. 215 (1976). The Court of Appeals decided that even though the statute did not give the inmate entitlement to parole, it created a justifiable expectation in parole. The term "justifiable expectation" is no doubt taken from the summary of this Court's holding in *Meachum* v. *Fano, supra,* as expressed in *Montanye* v. *Haymes,* 427 U.S. 236 (1976):

> "We held in Meachum v. Fano, that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within State, whether with or without a hearing absent some right or justifiable expectation rooted in State law that he will not be transferred except for misbehavior or upon the occurrence of other specified events. . . ." *Id.* at 242.

The Court of Appeals held that §549.261, RSMo 1969, created a justifiable expectation in parole by mandating that the inmate be paroled if he meets the statutory criteria. The petitioners submit that a statute which creates access to a rehabilitative program such as parole but preconditions parole on a broad discretionary and predictive decision by a State parole board does not create a "justifiable expectation" sufficient to invoke the Due Process Clause of the Fourteenth Amendment. The expectation of getting parole is not justifiable in the sense of the term used by this Court because the decision upon which the granting of parole depends is of such a nature that the possibility of a parole remains speculative. The nature of this decision, being highly discretionary and being of a

predictive and prognostic nature, has been held to be a critical factor in the decisions of those courts finding that no Due Process is applicable to parole release determinations. See, for instance, *Wiley* v. *United States Board of Parole,* 380 F.Supp. 1194. 1200 (M.D.Penn. 1974); and *Scarpa* v. *United States Board of Parole,* 477 F.2d 278, 281 (5th Cir. 1973), *vacated and remanded to consider mootness,* 414 U.S. 809, *vacated as moot,* 500 F.2d 992 (5th Cir. 1973). This unique and highly subjective nature of the parole release decision was recognized by this Court in *Moody* v. *Daggett,* 429 U.S. 78, 89 (1976). Compare *Board of Curators of the University of Missouri* v. *Horowitz,* ..... U.S. ....., 55 L.Ed.2d 124, 135 (1978).

In an important respect, the Missouri statutes differ from the Nebraska statutes which this Court is concerned with in *Greenholtz.* The Nebraska statutes grant the inmate parole *unless* the Board finds that there are certain factors mandating refusal to parole. The Missouri statute §549.261, RSMo 1969, gives the Board the authority to grant parole based on its decision that release will benefit society and the inmate. The statute itself does not grant parole. While this distinction may not be important if this Court decides that the inmates in Nebraska have no Due Process interest in parole, it could be a crucial distinction if this Court should decide that the Nebraska statute gives the inmates a right to parole defeasible only upon the occurrence of certain events. The Missouri statute does not give the inmates any right to parole defeasible upon the finding of certain events but rather preconditions the grant of parole on the discretionary decision of the Board of Probation and Parole.

This case represents an opportunity for this Court to resolve a conflict among the circuits on the issues of whether due process is applicable to parole release deter-

minations and, if due process is applicable, whether it requires the release to the inmate of adverse information contained in his file.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1136

James E. Williams and Junior Theobald, individually and on behalf of all other persons similarly situated,
Appellants,

v.

Missouri Board of Probation and Parole, W. R. Vermillion, Chairman, F. N. Strum and Dick Moore, Members of the Board,
Appellees.

Appeal from the United States District Court for the Western District of Missouri

Submitted: September 13, 1978
Filed: October 27, 1978

Before HEANEY and STEPHENSON, Circuit Judges, and HANSON,* Senior District Judge.

STEPHENSON, Circuit Judge.

On this appeal we are again confronted with the question of whether an inmate in a state prison is entitled

*The Honorable William C. Hanson, Senior United States District Judge, Southern District of Iowa, sitting by designation.

to the protection of the due process clause of the Fourteenth Amendment in his consideration for release on parole. We are satisfied that the due process clause is implicated and, accordingly, we reverse and remand to the district court.[1]

The plaintiffs-appellants in this action are prisoners incarcerated in the Missouri State Penitentiary, Jefferson City, Missouri, who were eligible for parole but were denied release.[2] They sought relief under 42 U.S.C. § 1983, claiming that the due process requirements of the Fourteenth Amendment apply to parole release determination proceedings and that the procedures followed by the Missouri Board of Probation and Parole are constitutionally inadequate. The defendants-appellees are the Missouri State Parole Board and its three members (Board).

The district court, in an opinion issued prior to this court's decision in *Inmates of the Neb. Penal and Correctional Complex* v. *Greenholtz,* 576 F.2d 1274 (8th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3190 (U.S. Oct. 3, 1978) (No. 78-201), held that an inmate's interest in the possibility of release on parole was not protected by the due process clause. *Williams* v. *Missouri Bd. of Probation and Parole,* 444 F. Supp. 473 (W.D. Mo. 1978).

In *Greenholtz,* this court held that, in view of the Nebraska statutes, an inmate's right to consideration for parole was an aspect of liberty to which the due process clause applies. We stated that "since Nebraska has made parole an integral part of its penological system and pro-

1. The Honorable William R. Collinson, United States District Judge for the Western District of Missouri.

2. The two named plaintiffs have been released on parole. Their release on parole does not render the case moot, however, since it was properly certified as a class action under Fed. R. Civ. P. 23.

vided that those eligible for parole are to be released on parole unless one of the reasons for denial specified in the statute is found to be present, the authority to deny parole must not be exercised arbitrarily. Neb.Rev.Stat. § 83-1,114 provides the inmates with a justifiable expectation rooted in state law that they will be conditionally released if they meet the statutory standards. Consequently, the Fourteenth Amendment due process clause is implicated." *Inmates of the Neb. Penal and Correctional Complex* v. *Greenholtz, supra,* 576 F.2d at 1281.

The parties in the present case stipulated as to the structure of the Board and the procedures it employs in reaching its decisions on whether to grant parole. Those procedures were thoroughly discussed in the district court opinion and will not be restated here in detail.[3] *See Williams* v. *Missouri Bd. of Probation and Parole, supra.* We do note that under Mo. Ann. Stat. § 549.261 (Vernon), an inmate is entitled to make application for parole and shall be given a parole hearing after serving one-third of his sentence or 12 months, whichever is less, in an orderly and peaceful manner without having any infraction of the rules or laws of the institution reported against him. If the inmate does not so qualify he is given a hearing upon request after serving two-thirds of his sentence or two years, whichever is less. At a parole hearing an inmate is allowed to personally appear before the Board and present his reasons why he thinks he is ready for release on parole. If parole is denied after a hearing, an inmate's application for parole is "set-back" or continued for a max-

3. Subsequent to the trial of this matter, but before the district court issued its opinion, the Board adopted new rules and regulations. The Board sought dismissal of the action as moot. The district court did not address the merits of this motion because of its holding that the due process clause does not apply to parole release determinations. The issue of mootness may be considered on remand.

imum of five years, although usually for not longer than one year. At the end of such time the inmate receives a review of his parole status. He is not allowed to personally appear at the review and the decision is made on the basis of the parole file. Prior to a review, an inmate is interviewed by an institutional parole officer whose report is contained in the inmate's parole file.

On appeal the Board argues that the *Greenholtz* decision is not dispositive of this case. The Board submits that the provisions of the Missouri statutes are sufficiently distinguishable from those of Nebraska to require a different result. Mo. Ann. Stat. § 549.261 (Vernon) provides:

> Parole from state penal institutions, prisoners eligible, when—interview by board—rules
>
> 1. When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release on parole any person confined in any correctional institution administered by state authorities. All paroles shall issue upon order of the board, duly adopted.
>
> 2. Any person who has been committed to a penal or correctional institution under the administration of the department of corrections, who has served either one-third of his time or twelve months of the time for which he was sentenced, whichever is a shorter period, in an orderly and peaceable manner without having any infraction of the rules or laws of the institution recorded against him shall be eligible to make application for parole and shall be given a hearing. Any person who has served two-thirds of his time or two years of the time for which he was sentenced, whichever is the shorter period, shall be eligible to make application for parole and shall be given a hearing. Paroles may be granted, however, before the minimum period specified has been served.
>
> 3. Before ordering the parole of any prisoner, the board shall have the prisoner appear before it and shall interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or a pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be subject to the orders of the board.
>
> 4. The board may adopt such other rules not inconsistent with law as it may deem proper or necessary, with respect to the eligibility of prisoners for parole, the conduct of parole hearings, or conditions to be imposed upon parolees. Whenever an order for parole is issued it shall recite the conditions thereof.

Although it is true that the language of the Nebraska and Missouri statutes is not identical, the statutes are similar in crucial aspects. Both statutes state that it is up to the Board to determine when parole should be granted. Both statutes provide that every inmate has the right to be considered for parole and have a hearing after meeting the eligibility standards prescribed by the statutes. Most importantly, both statutes anticipate that an inmate is to be released on parole unless he fails to meet certain statutory guidelines.[4] In sum, both statutes create the

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4. Mo. Ann. Stat. § 549.261 (Vernon) calls for a prisoner to be paroled when the Board determines that "there is [a]

(*Continued on following page*)

right to be considered for a parole and create a justifiable expectation rooted in state law that if the statutory criteria are satisfied the inmate will be released on parole. *See Inmates of the Neb. Penal and Correctional Complex* v. *Greenholtz, supra,* 576 F.2d at 1281; *Franklin* v. *Shields,* 569 F.2d 784, 789-90 (4th Cir. 1977), *rev'd en banc,* 569 F.2d 800 (4th Cir. 1978) (reversed upon the grounds that "the only explicit constitutional requisite is that the Board furnish to the prisoner a statement of its reasons for denial of parole"). *Compare Meachum* v. *Fano,* 427 U.S. 215, 228 (1976); *Montanye* v. *Haymes,* 427 U.S. 236, 242 (1976). Therefore, the inmate's right to be considered for parole involves his liberty interest and must not be abrogated without compliance with the minimum due process procedures required under the circumstances. *Inmates of the Neb. Penal and Correctional Complex* v. *Greenholtz, supra,* 576 F.2d at 1281; *Franklin* v. *Shields, supra,* 569 F.2d at 788.

Having concluded that the due process clause is applicable, the question remains what procedural safeguards are necessary. In *Greenholtz,* we set out guidelines concerning the minimum due process requirements to be followed in the parole decisional process in Nebraska. We concluded that:

> [A]s a minimum the due process clause of the Fourteenth Amendment requires the following: (1) Every inmate is to receive a formal parole hearing upon first becoming eligible for parole. Subseqent hearings

Footnote continued—

reasonable probability that the prisoner can be released without detriment to the community or to himself * * *. The Board has adopted more detailed guidelines, similar to those in Neb. Rev. Stat. § 83-1,114, to aid it in its determination. *See* Missouri Board of Probation and Parole, Rules and Regulations Governing the Granting of Paroles and Related Procedures 14-16 (1970).

> are to be allowed in the discretion of the Board. (2) Each inmate is to receive a written notice of the date and hour of the hearing reasonably in advance. This notice shall contain a list of the factors which may be considered by the Board in making its determination. (3) Subject to security considerations, every inmate is allowed to appear in person before the Board and present documentary evidence in support of his application. In the absence of unusual circumstances an inmate does not have a constitutional right to call witnesses in his behalf. (4) A record of the proceedings which is capable of being reduced to writing must be maintained. (5) Within a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.

Inmates of the Neb. Penal and Correctional Complex v. *Greenholtz, supra,* 576 F.2d at 1285.

In addition to the requirements specified in *Greenholtz,* the plaintiffs in this case have requested that an inmate be given access to his parole file prior to his hearing or review so that he may correct, rebut, or explain any adverse information in the file.[5] The parties stipulated that the parole file contains such things as the presentence report; psychological and psychiatric reports; information concerning any previous periods spent on parole or probation while under the supervision of the Board; prison disciplinary reports; and a list of previous arrests and juvenile proceedings. *See Williams* v. *Missouri Bd. of*

5. The plaintiffs also claimed that they were entitled to have counsel present at the parole hearing. Both parties acknowledge that this issue is now moot. *See Williams* v. *Missouri Bd. of Probation and Parole, supra,* 444 F. Supp. at 475.

Probation and Parole, supra, 444 F. Supp. at 476. The parties also stipulated that the parole file sometimes contains comments or information submitted by law enforcement officials, the sentencing judge, or by anyone else who wishes to send their comments or other material to the Board. *Id.* at 477. Newspaper articles pertaining to an inmate's trial or conviction may also be maintained in a parole file.

It is obvious from the above list that many files may contain erroneous or misleading information which could flaw the parole decisional process if left unverified and unrebutted. In the past the Board's policy has been to not allow an inmate to inspect his parole file or to advise him of adverse information in the file. At a hearing an inmate is on occasion asked questions concerning information in the file. A decision following a review is based solely on the information in the file without input from the inmate.

Both the inmate and society in general have a substantial interest in seeing that a parole release determination is made on the basis of accurate information and informed discretion. *See Inmates of the Neb. Penal and Correctional Complex* v. *Greenholtz, supra,* 576 F.2d at 1282. We are convinced that as a minimum due process requires that an inmate in Missouri seeking parole be advised of adverse information in his file. In order for an inmate to have meaningful consideration of his application for parole it is essential that he be apprised of such adverse information and given an opportunity to rebut or explain the parts he believes are incorrect. However, we are mindful that the state has legitimate interests in protecting confidential sources and maintaining security and discipline within the prison.

Although we are unwilling at this time to adopt it verbatim as a constitutional minimum, we do note with approval the federal regulations contained in 28 C.F.R. § 2.55. These regulations resolve the conflicting interests by providing that a prisoner is entitled to review reports and other documents in his file which will be considered at the parole hearing. Exceptions are made for those portions of the file which contain:

> (1) Diagnostic opinions which, if known to the prisoner, could lead to a serious disruption of his institutional program;
>
> (2) Material which would reveal sources of information obtained upon a promise of confidentiality; or
>
> (3) Any other information which, if disclosed, might result in harm, physical or otherwise, to any person. The term "otherwise" shall be deemed to include the legitimate privacy interests of such person under the Privacy Act of 1974.

28 C.F.R. § 2.55. If one of the exceptions is invoked, then the file must contain a summary of the basic contents of the material to be withheld. *See also Franklin* v. *Shields, supra,* 569 F.2d at 794-95; Minn. Stat. Ann. § 15.165 (West). *Cf.* Fed. R. Crim. P. 32(c)(3) (disclosure of presentence reports). *But see Franklin* v. *Shields, supra,* 569 F.2d at 800-01 (en banc); *Williams* v. *Ward,* 556 F.2d 1143, 1159-62 (2d Cir. 1977); *Holup* v. *Gates,* 544 F.2d 82, 85-86 (2d Cir. 1976).

We remand this case to the district court so that, after consideration of the relevant Missouri statutes, the Board's current rules and regulations, the evidence presented in this case (including additional evidence intro-

duced after remand, if necessary), the *Greenholtz* decision, and the instant opinion, it may decide what are the minimum due process requirements under the circumstances. The case should then be remanded to the Board for development of regulations implementing the guidelines delineated by the district court.

Reversed and remanded.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 74CV125-W-2

JAMES E. WILLIAMS and JUNIOR THEOBALD, individually and on behalf of all other persons similarly situated,

Plaintiffs,

vs.

MISSOURI BOARD OF PROBATION AND PAROLE, et al.,

Defendants.

MEMORANDUM OPINION AND JUDGMENT

(Filed January 17, 1970)

The plaintiffs in this action are prisoners incarcerated in the Missouri State Penitentiary, Jefferson City, Missouri, who were eligible for parole but were denied release. They filed a pro se Complaint challenging the Constitutionality of the procedures of the Missouri Board of Probation and Parole. They name the Missouri State Parole Board and its three members[1] as defendants. By this action, brought under the provisions of 42 U.S.C. § 1983

1. W. Sartorious was originally named as a defendant in his capacity as a member of the Board; however, he left that position and under the provisions of Rule 21, Fed. R. Civ. P., Dick Moore, who replaced Sartorious on the Board, was substituted.

(1970), plaintiffs, on their behalf and on behalf of a class of inmates eligible for parole, seek injunctive and declaratory relief. Three months after the Complaint was filed, counsel from the Legal Aid and Defender Society of Greater Kansas City entered his appearance on behalf of plaintiffs and attorneys from that organization have represented plaintiffs since that time.

By order entered in July, 1975, the class plaintiffs sought to represent all inmates incarcerated in penal institutions of the State of Missouri who are presently or in the future will be subject to the jurisdiction of the Missouri Board of Probation and Parole and who are being or will be brought before that Board for a parole release hearing, was certified.

Plaintiffs initially challenged the Parole Board procedures under both the Equal Protection Clause and the Due Process Clause of the United States Constitution but plaintiffs abandoned their Equal Protection claims as demonstrated by the stipulation filed by the parties prior to the trial in this cause. That stipulation states the primary issue as whether "the due process requirements of the Fourteenth Amendment to the Constitution of the United States appertain in the parole release decisional process." The prisoners contend that the Due Process Clause entitles them to the following protections relating to parole eligibility determinations:

(1) Establishment and publication of factors, beyond the statement in the Board's Rules and Regulations, which the Board considers important in their decisional process and the criteria used by the Board in weighing the factors;

(2) Access to the factual data which the Board considers in determining whether to grant or deny

parole with the opportunity to supplement, contradict or correct that data in writing prior to a parole decision and adequate notice of the existence of factual information upon which an adverse decision might be based;

(3) Representation by counsel or an advocate at the parole hearing;

(4) An opportunity at the parole hearing to be present when witnesses testify in their behalf; to cross-examine adverse witnesses who testify against them and to examine and rebut adverse information contained in their files; and

(5) A written statement of reasons, more specific than those currently given, for denial of parole and/or a written summarization of the factual basis for the Board's decision and the criteria and reasoning employed in the determination.

After the trial in this cause the Parole Board adopted new rules and regulations which provide: that an inmate may have one person attend the hearing with him; for written reasons for parole denial or set back; and for an administrative appeal process. Defendants have filed a post-trial motion based upon these new procedures by which they seek the dismissal on the grounds of mootness of the issues relating to the new procedures. Plaintiffs filed a "Motion in Opposition" to this motion in which they state that they "agree that only the narrowly circumscribed issue of counsel at the parole hearing is now moot, but the major thrust of plaintiffs' argument that the present procedure and factual information upon which an adverse decision might be made still lies at the heart of the case at Bar." For reasons discussed below the Court need not address defendant's motion.

Plaintiffs make no claim that they are entitled to immediate release or that they have a right to be granted parole. Their claims instead are a straightforward attack on the constitutionality of the procedures of the State Parole Board and specifically on the denial of procedural Due Process protections in the course of parole eligibility determinations.

The parties have stipulated to the structure of the Board and the procedures it employs in making those decisions. Their stipulation includes the following facts. The Missouri Board of Probation and Parole was created pursuant to RSMo. §549.205 (1969). The Board has ultimate responsibility for the granting and denying of parole to prisoners in all state penal institutions in Missouri. In addition, the members of the Board supervise the probation and parole staff which is responsible for supervising parolees and probationers and compiling presentence reports at the request of sentencing judges. The Board consists of three members appointed by the Director of the Department of Social Services with approval of the Governor and with the advice and consent of the Senate. The members of the Board are currently W. R. Vermillion, Chairman, Ferd Sturm, and Dick D. Moore. The Board employs two parole analysts who participate in the decision to decide whether inmates should be granted parole and who write the statement of reasons on behalf of the Board which informs an inmate why he has been refused parole. The analysts have no administrative responsibilities. The Board employs fifteen institutional parole officers who are stationed in each of the institutions under the supervision of the Division of Corrections. One of the functions of each institutional parole officer is to evaluate inmates prior to parole hearings and reviews and prepare a written report summarizing all data known about the inmate and evaluating his chances of success on parole, including a

recommendation as to whether parole should be granted. At the time of the stipulation in July, 1976, each institutional parole officer was responsible for interviewing and evaluating approximately 450 inmates each year. Other duties include the performance of counseling functions, answering correspondence pertaining to inmates, serving as a member of the classification team for the inmates in their case load.

RSMo. §549.261 (1969) provides that prisoners in the Missouri Division of Corrections shall be released on parole when, in the opinion of the Board, there is reasonable probability that the prisoner can be released without detriment to the community or to himself. Under the provisions of RSMo. §549.261 an inmate shall be eligible to make application for parole and shall be given a hearing when he has served one-third of his sentence or twelve months, whichever is less, in an orderly and peaceful manner without having any infraction of the rules or laws of the institution reported against him. Any inmate who has served two-thirds of his time or two years, whichever is less, shall be eligible to make application for parole and shall be given a hearing. Paroles may be granted, however, before the minimum period specified has been served. That same section further provides that parole is to be ordered only in the best interest of society and not as an award of clemency; it is not to be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when the Board believes that he is able and willing to fulfill the obligations of the law abiding citizen. Every person while on parole remains in the legal custody of the institution from which he was released, but is subject to the orders of the Board.

The rules and policies governing the parole decision making process are contained in the statutes discussed

above and in the rules and regulations of the Board set out in the booklet published by the Parole Board entitled "Rules and Regulations Governing the Granting of Paroles and Related Procedures" as modified in January, 1977. An inmate's first parole hearing generally will be scheduled according to a chart printed in the booklet; however, any inmate so requesting may have a parole hearing at the end of his first year at the institution even if the chart would indicate it should be after a longer period. Within thirty days of an inmate's assignment within the Division of Corrections, the inmate is notified by letter of the month of his first parole hearing. Within forty-five days of the first and of any subsequent hearings, the inmate is notified by letter of the exact day of the hearing.[2]

Parole hearings are conducted by a panel of three persons comprised of the two parole analysts and one member of the parole board. Following the initial hearing, parole may be granted, denied or the case may be "setback." The term "setback" is used to describe the setting of a case for another hearing or review at a subsequent time. When the Board issues a setback and assigns the inmate to a review at a later date, the inmate is notified of the month and the year during which the review is to take place. This notification is made in writing on the same sheet that contains the written statement of the reasons for the setback.[3] A parole review differs from a parole hearing in that the inmate does not appear before the Board personally but information contained in his parole file, including a prereview report pre-

2. Although these facts as to notice were not stipulated to prior to the trial, testimony given at the trial establishes that this is the procedure that is generally followed.

3. These facts also were not stipulated to, but were established at the trial.

pared by an institutional parole officer, is reviewed by a panel and a decision may be made to grant or deny parole or give a further setback.

All inmates are provided a copy of the rules and regulations booklet which contains a list of the matters considered by the Board in their determination of whether an inmate should be paroled. The rules and regulations of the Board and RSMo. §549.261 (1969) contain the only written criteria for the granting of parole and no additional policies or standards have been promulgated by the Board.

The Board maintains a parole file for each inmate eligible for parole. That file generally contains the following:

(a) The classification report prepared for the inmate by the Division of Corrections when he entered the institution;

(b) Presentence report;

(c) Psychiatric reports, if available;

(d) Psychological reports, if available;

(e) Prereview and progress reports;

(f) Information concerning any previous periods spent on parole or probation while under the supervision of the Board;

(g) Prison disciplinary reports;

(h) Material on previous time spent in the custody of the Division of Corrections;

(i) A list of previous arrests;

(j) References to juvenile proceedings; and

(k) Older files contain work reports from prison work supervisors.

Other information which may be contained in parole files includes any comments or information submitted by law enforcement officials, the sentencing judge and by anyone else who may wish to send their comments or other material to the Board, including unsolicited comments from individuals who wish to protest or support an individual application for parole. The Board has in fact received and does examine such materials. As a matter of Board policy, inmates are not advised of the existence of adverse materials in the files submitted by judges, prosecutors, law enforcement personnel or other persons. No formal procedure by which an inmate can determine the existence of adverse allegations or factual statements in his parole file is available, but members of the hearing panel may discuss particular items with the inmate at a hearing. As a matter of Board policy, inmates and their counsel are not permitted to inspect their parole files. The official and community attitude reports in the files are prepared by the field offices of the Board, in those cases in which they are requested by the Board, and contain summarized interviews with police officers, judges, prosecutors, victims and citizens in the community from which the inmate was sentenced or in which the offense was committed. Official and community attitude reports are one of the factors considered in deciding the location to which an inmate should be paroled. The reports of psychologists and psychiatrists are utilized by members of the Board and parole analysts in making decisions whether to grant or deny parole; however, in line with Board policy, these reports are not available for inspection by either inmates or their counsel.

After reviewing the parole file and interviewing the inmates, institutional parole officers prepare "progess reports" prior to scheduled parole hearings and "prereview

reports" prior to scheduled reviews. At the interview, the institutional parole officer will ask the inmate, among other things, about his prior record, his past behavior both in and outside of the institution, and his plans should he be released on parole.[4]

Progress and prereview reports generally contain a summary of the inmate's criminal history including references to juvenile offenses, a summary of his social history, a description of his progress in the institution, a description of any disciplinary offense and views of correctional officers about the inmate, a description of his attitude at the time of the report, a description of programs within the institution in which he is involved and his progress in those programs, a description of the inmate's release plan, a summary of the contents of the psychologcal and psychiatric reports if available, a summary of the official and community attitude report if available, an evaluation of the inmate by the institutional parole officer, and a recommendation as to whether parole should be granted. Institutional parole officers evaluate an inmate's assets and liabilities in prereview and progress reports. In arriving at his recommendation concerning release on parole, each institutional parole officer exercises his individual judgment in the weight to be given the various factors examined under the circumstances of each case. The release plan is a detailed plan of what the inmate would do if he were released, including housing and job arrangements. The release plan is evaluated by the field office in the particular community to which the inmate plans to relocate. Release plans are prepared by the inmate with the assistance and cooperation of institutional parole officers. The purpose of the prereview and

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4. The nature of these interviews are not part of the facts stipulated to prior to trial, but was testified to at the trial.

progress reports are to summarize the information already contained in the parole file so that a complete reading of the file is ordinarily unnecessary by the members of the hearing and review panels before making their decisions and to offer the institutional parole officer an opportunity to make his evaluation and suggestions regarding parole. In progress and prereview reports institutional parole officers may evaluate, among other factors, the inmate's self-control, his self image, his feeling of remorse for the crime for which he was convicted as that feeling bears on the degree of insight which the inmate has into his situation, the inmate's institutional adjustment, the inmate's ability to handle stressful situations, the inmate's disciplinary reports insofar as they bear on his ability to handle stressful situations, and the inmate's pattern of behavior. In determining the latter factor, the parole officer may include in his evaluation the inmate's prior offenses, juvenile offenses, and his institutional record. The institutional parole officer's sources of information for his report will include, but not necessarily be limited to, the contents of the parole file, discussion about the inmate with guards, job supervisors, teachers, and other members of the Division of Correction's staff, and the interview with the inmate. Views of the Division of Correction's staff will sometimes be included in the report. The institutional parole officers do not have the time nor the resources to make independent investigations to verify all the information they receive from sources inside and outside the institution. Progress and prereview reports prepared by the institutional parole officers are utilized to a significant degree by the members of the Board and parole analysts in the decision-making process because they believe that the officer's close proximity to the inmate and daily contact with the institutional staff gives them the proper perspective from which to view

various aspects of each inmate's character. Normally all information which the institutional parole officer wishes to communicate to the Board will be contained in his report and the officer usually does not have personal contact with the members of the Board or parole analysts with regard to specific cases, although such contact is possible.

At the hearing, one of the three individuals making up the panel assumes primary responsibility for interviewing each inmate. That panel member has in his possession the case file for the inmate appearing for parole determination. The other two members of the panel are furnished copies of the presentence report, the classification report, and the latest progress report prior to the hearing. Generally these two will not examine the parole file itself. In the process of the hearing, the panel members question the inmate and discuss with him subjects including, but not necessarily limited to, his present offense, prior offenses, his record of arrests, his institutional activity and his proposed release plan. The parole applicant may correct facts disclosed to him by the institutional parole officer at the interview or by the hearing panel at the hearing by means of his own oral presentation or by written means or by the presentation of witnesses who may meet with the Board either immediately after the hearing or in the Board's central offices in Jefferson City, Missouri. Witnesses, including an attorney, may also have an interview with the Board at its central offices prior to a Board review.[5] Witnesses may appear and testify before the Board on an inmate's behalf, but the inmate is not allowed to be present when the testimony is taken and should a witness testify against

5. The facts relating to applicants' opportunities to correct factual data and have witnesses appear before the board were not stipulated to, but were established by testimony at the trial.

the inmate at the hearing, it is Board policy not to allow the inmate to be present.

On the average, each inmate spends twenty minutes before the hearing panel. Following this hearing or a review, the panel members indicate their decisions on a Board Hearing and Action Sheet. This form contains thirteen reasons, the most common reasons given, for denial of parole or setback. However, additional reasons may be indicated in writing on the sheet. The decision as to whether or not to deny parole is normally made after the conclusion of the hearing and after the panel members have discussed their decisions. Occasionally, the panel will defer decision until information on parole release plans or psychiatric evaluation which have been requested become available. By statute, at least two Board members must concur in any decision granting parole; therefore, if the hearing panel votes to grant parole, another Board member must agree to that decision.

If parole is denied or a setback is given, the inmate is given written reasons for that action which are prepared by a parole analyst. The analysts draft the reasons to be given the inmate after the hearings are completed. Ordinarily, there is not additional consultation with the other panel members as to the reasons. The written reasons always suggest that the inmate contact his institutional parole officer about additional information concerning the reasons. The institutional parole officer is the individual who gives the written reasons to the inmate and who is immediately available for counseling in reference to the Board's decision. His understanding of why parole was denied or a setback given is based on the statement of reasons prepared by the analyst, comments contained on the Board Hearing and Action Sheet, and

his own report to the Board. If an inmate requests information concerning a decision from an institutional parole officer which the officer does not have, he may refer the inmate to the Board or to the parole analysts. The same procedure relating to written statement of reasons is followed after a setback or a denial after a review.

At the time of the stipulation, approximately 140 hearings and 105 reviews were conducted each month.

At the trial, plaintiffs offered into evidence certain exhibits, some sixteen documents taken from parole files plus three complete files, to which defendants objected. With leave of Court, defendants entered specific objections to these exhibits in a post-trial written memorandum. Defendants object to thirteen of these exhibits as being irrelevant since the type of information included in an inmate's parole file was stipulated to by the parties prior to the trial. Furthermore, defendants state that the three parole files offered are files of three inmates who were either released or paroled prior to the trial and their files contain documents predating September, 1974, when the Board initiated new procedures relating to parole release proceedings. They therefore contend that all these offered exhibits are inadmissible.

Plaintiffs take the position that these exhibits are illustrative of the nature of the interest inmates have in gaining access to their files prior to parole decisions so that they can adequately correct or rebut factual allegations or are illustrative of the sorts of reasons given for parole denial. Plaintiffs contend that these exhibits, as a demonstration of the substance of the files themselves rather than their form, are relevant to the balancing of competing interests involved in the determination of the Constitutional question of how much process is due. The Court at this time, based on plaintiffs' arguments, overrules defen-

dants' objection to the admission into evidence of these exhibits and plaintiffs' Exhibits Number 1, 3, 5 through 9, and 11 through 19 will be admitted into evidence.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law. . . ." The application of this clause to parole eligibility proceedings involves two questions: first, is a prisoner's interest in parole protected by the Fourteenth Amendment; and second, if it is, what specific procedures are required to assure due process of law.

The Circuits are split with respect to the first question.[6] And the Supreme Court has yet to decide whether Due Process extends to parole release hearings, although cases raising the question have recently reached that Court.[7]

The initial question is whether plaintiffs assert an interest within the framework of the Fourteenth Amend-

6. United States Circuit Courts of Appeal holding that Due Process is applicable are: United States ex rel. Johnson v. Chairman, 500 F.2d 925 (2d Cir. 1974), *vacated as moot sub nom.*, Regan v. Johnson, 419 U.S. 1015 (1974); Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot*, 423 U.S. 147 (1975); Franklin v. Shields (4th Cir. decided September 19, 1977); United States ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied* 425 U.S. 914 (1973); and Childs v. United States Board of Parole, 167 U.S. App. D.C. 268, 511 F.2d 1270 (1974). Those Circuit courts holding to the contrary are: Scarpa v. United States Board of Parole, 477 F.2d 278 (5th Cir. 1973), *judgment vacated and remanded for a determination of mootness*, 414 U.S. 809 (1973), *dismissed as moot*, 501 F.2d 992 (1973); Brown v. Lundgren, 528 F.2d 1050 (5th Cir. 1976), *cert. denied* 429 U.S. 917 (1976); Dorado v. Kerr, 454 F.2d 892 (9th Cir. 1972), *cert. denied* 409 U.S. 934 (1972); Mosely v. Ashby, 459 F.2d 477 (3d Cir. 1972); Madden v. New Jersey State Parole Board, 438 F.2d 1189 (3d Cir. 1971); and Scott v. Kentucky Board of Parole (6th Cir. unreported), *remanded for determination of mootness*, 429 U.S. 60 (1976).

7. Weinstein v. Bradford, 423 U.S. 147 (1975) was vacated as moot. *See* Justice Steven's dissenting opinion in Scott v. Kentucky Parole Board, 429 U.S. 60 (1976), which was remanded for consideration of the question of mootness.

ment's protection of "liberty" and "property." *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972). An identification of plaintiffs' interest is the first step in the process. Their interest is the present "right" to be considered for parole, a "right" created by Missouri statute.[8] This state created interest can be characterized as a privilege or a matter of grace. However, that characterization is no longer determinative of whether due process is applicable. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 n. 4 (1973).

It goes without saying that this interest is one to which parole applicants attach great importance. The denial of parole after a Board determination constitutes a grievous loss since the applicant must remain within the confines of the penal institution rather than being released albeit on conditional terms. However, not every grievous loss invokes the procedural protections of the Due Process Clause. "To determine whether due process requirements apply . . . we look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents* v. *Roth, supra* at 570-571; *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976).

The *nature* of plaintiffs' interest is one of a decision-making process complete with the trappings of analysis by the Parole Board of the applicant's past and anticipated future behavior as prescribed by Missouri statute.[9] The ultimate determination of the Board is founded upon informed decision making—a prognostic determination of the suitability of an applicant's release. This prognostication may be based on factors such as: "(1) length and seriousness of prior criminal record; (2) family history; (3)

8. See discussion above of RSMo. § 549.261 (1969).

9. RSMo. § 549.261(1) (1969) provides: "When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release on parole any person confined in any correctional institution administered by state authorities. All paroles shall issue upon order of the board, duly adopted."

marital situation; (4) vocational and professional skills; (5) education; (6) physical condition; (7) living habits in a free community; (8) behavior and progress while incarcerated." *Scarpa* v. *U.S. Board of Parole, supra* at 281. The determination based on this complex of factors has roots which lie in such fields as psychology, sociology, criminology and penology.

The decision making process involved in parole eligibility is not one of the determination of establishable facts or provable acts as in *Wolff* v. *McDonnell,* 418 U.S. 539 (1974), where prison disciplinary proceedings at which statutorily created good time credits could be forfeited only for serious misbehavior, *see Meachum* v. *Fano, supra* at 226; or as in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972), where the Supreme Court held that Due Process does apply to parole revocation decisions since a determination must be made on whether conditions of parole have, in fact, been violated. The Supreme Court hinted that they recognize a distinction between parole eligibility and parole revocation determinations in footnote 8 at page 482 of the *Morrissey* opinion where they quote from the Second Circuit Court of Appeals:

> "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." United States ex rel. Bey v. Connecticut Board of Parole, 443 F.2d 1079, 1086 (1971).

Because the nature of the decision of the Parole Board is predictive and discretionary, based on individual determinations in the case of each applicant, plaintiffs have no more than an expectancy of conditional release, a possibility of parole. In a recent Eighth Circuit opinion, the Court of Appeals, citing *Scarpa* v. *U.S. Board of Parole, supra* at

282, and *Barradale* v. *United States Bd. of Paroles & Pardons,* 362 F. Supp. 338, 340 (M.D. Pa. 1973), held that a Minnesota prisoner's 42 U.S.C. § 1983 claims for monetary damages based on the state parole board's miscalculation of his target release date could not stand based in part on the finding that "[i]f a parole board refuses to grant parole, the inmate has suffered no deprivation." *Kelsey* v. *State of Minnesota,* n. 3, Action No. 77-1532, decided November 8, 1977.

In short, the nature of the interest involved identifies the interest as one which is ephemeral, a subjective expectancy. This possibility of parole is not the type of interest which brings into play the procedural protections of the Due Process Clause.

Kelsey establishes that

> an inmate may prevail in a suit seeking reconsideration of parole, or an attack on the parole board's manner of decision making only if the board's action was "flagrant, unwarranted and unauthorized." *Scarpa* v. *U.S. Board of Parole,* 477 F.2d 278, 283 (5th Cir.) (en banc), *vacated and remanded to consider mootness,* 414 U.S. 809 (1973), or if the board failed to substantially comply with the guidelines it has established for itself. *Masiello* v. *Norton,* 364 F. Supp. 1133 (D. Conn. 1973). *See also Scott* v. *Kentucky Parole Board,* 429 U.S. 60 (1976); *Burton* v. *Ciccone,* 484 F.2d 1322 (8th Cir. 1973).

Kelsey, supra at 6-7.[10]

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10. Although Scarpa has been dismissed as moot, 501 F.2d 992 (1973), the Fifth Circuit has substantially readopted the reasoning of that case in Brown v. Lundgren, 528 F.2d 1050 (1976). Scott was not decided by the Supreme Court but was remanded for a determination of mootness. The Kelsey court's reference to that case is to the dissenting opinion of Justice Stevens which discusses reasons why the issue of Due Process application of parole eligibility determinations should have been decided in that case.

There is no evidence in this case that the Board's action was "flagrant, unwarranted, or unauthorized" or that it failed to comply with its own guidelines. And in fact, a large part of the evidence presented by plaintiffs related to the parole determination system now in operation in the State of Minnesota.

Plaintiffs' interest is that of the possibility of conditional release on parole, such a release to be ordered after a determination which is predictive in nature. The procedural protections of the Fourteenth Amendment of the United States Constitution do not adhere to this interest and are not mandated by that Amendment in relation to proceedings of the Missouri State Board of Probation and Parole in its determination of whether or not an inmate in the Missouri Division of Corrections should be paroled. Furthermore, there has been no evidence that plaintiffs have been denied parole in an unwarranted, unauthorized or flagrant manner. Therefore, the injunctive and declaratory relief plaintiffs seek will be denied and judgment will be entered in favor of defendants.

For the foregoing reasons, it is

ORDERED that the injunctive and declaratory relief sought by plaintiffs be, and the same hereby is, denied; and the Clerk of Court is hereby directed to enter judgment in favor of defendants.

/s/ Wm. R. Collinson
District Judge

Dated: January 17, 1978.

APPENDIX C

Revised Statutes of Missouri, 1969

549.205. State board of probation and parole created—members, qualifications, tenure—vacancies, how filled.—1. There is created and established a "State Board of Probation and Parole" which shall consist of three members appointed by the governor, by and with the advice and consent of the senate.

2. Members of the board shall be persons of recognized integrity and honor, known to possess ability, experience and other qualifications fitting them for the successful performance of their official duties. Not more than two members of the board shall be of the same political party.

3. Of the members first appointed, one shall be appointed to serve for a term of two years, one for four years, and one for six years. At the expiration of the term of each member and of each succeeding member, the governor shall, by and with the advice and consent of the senate, appoint a successor who shall hold office for a term of six years and until his successor has been appointed and qualified. Members may be appointed to succeed themselves.

4. Vacancies occurring in the office of any member shall be filled by appointment by the governor, by and with the advice and consent of the senate, for the unexpired term. In any case of vacancy, while the senate is not in session, the governor shall make a temporary appointment until the next meeting of the senate, when he shall nominate some person to fill such office.

549.261. Parole from state penal institutions, prisoners eligible, when—interview by board—rules.—1. When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the board shall release or parole any person confined in any correctional institution administered by state authorities. All paroles shall issue upon order of the board, duly adopted.

2. Any person who has been committed to a penal or correctional institution under the administration of the department of corrections, who has served either one-third of his time or twelve months of the time for which he was sentenced, whichever is a shorter period, in an orderly and peaceable manner without having any infraction of the rules or laws of the institution recorded against him shall be eligible to make application for parole and shall be given a hearing. Any person who has served two-thirds of his time or two years of the time for which he was sentenced, whichever is the shorter period, shall be eligible to make application for parole and shall be given a hearing. Paroles may be granted, however, before the minimum period specified has been served.

3. Before ordering the parole of any prisoner, the board shall have the prisoner appear before it and shall interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or a pardon. A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every prisoner while on parole shall remain in the legal custody of the institution from which he was released but shall be subject to the orders of the board.

4. The board may adopt such other rules not inconsistent with law as it may deem proper or necessary, with respect to the eligibility of prisoners for parole, the conduct of parole hearings or conditions to be imposed upon parolees. Whenever an order for parole is issued it shall recite the conditions thereof.

549.285. Records privileged and confidential—inspection by defendant or prisoner.—The presentence report, the preparole report and the supervision history, obtained in the discharge of official duties by any member or employee of the board, shall be privileged and shall not be disclosed directly or indirectly to anyone other than the board, the judge of the court having jurisdiction over the defendant, or others entitled under sections 549.205 to 549.291 to receive such information, except that the board or court may at their discretion permit the inspection of the report or parts thereof by the defendant or prisoner or his attorney, or other person having a proper interest therein, whenever the best interest or welfare of a defendant or prisoner makes the action desirable or helpful.

(L. 1957 p. 380 §12, A.L. 1965 p. 665)

549.291. Law construed, how.—Sections 549.205 to 549.291 shall be liberally construed to the end that the treatment of persons convicted of crime shall take into consideration their individual characteristics, circumstances, needs, and potentialities as revealed by a case study, and that such persons shall be dealt with in the community by a uniformly organized system of constructive rehabilitation, under probation supervision instead of in correctional institutions, or under parole supervision when a period of institutional treatment has been deemed essential, whenever it appears desirable in the light of the needs of public safety and their own welfare.

Code of State Regulations

TITLE 13—DEPARTMENT OF SOCIAL SERVICES

Division 80—Board of Probation and Parole

Chapter 2—Parole Consideration

13 CSR 80-2.010 Parole Hearings

PURPOSE: Parole hearings, which are personal appearances of an inmate of a state adult correctional institution before the Board of Probation and Parole, are required by section 549.261 RSMo (1969). This rule sets forth the purposes and procedures for such hearings and the various possible results of such a hearing.

(1) Parole hearings are conducted for the following purposes:

(A) to allow the inmate the opportunity to

1. present to the Parole Board in person his own version of the present offense;

2. to discuss his own problems and needs;

3. to discuss his evaluation of the progress he has made towards his rehabilitation while confined;

4. to present his reasons why he thinks he is ready for parole release consideration;

5. to present his plans for the future;

6. to present and discuss any other matters that are appropriate for consideration for his parole release;

(B) to provide the Parole Board the opportunity to:

1. review all available reports and case history material pertinent to his case: such as, social history, medical,

psychological and psychiatric reports, prior record of arrests and circumstances pertaining thereto, past and present patterns of behavior;

2. review his institutional adjustment, conduct and progress as such reflects upon his attitude and preparation to resume his life in free society;

3. evaluate him as a person in regard to his readiness for parole release.

(2) Parole hearings are conducted each month at the state penitentiary, intermediate reformatory, training center for men, correctional center for women, Church prison farm, and the honor camp. Parole hearings may be held once every two months at the correctional center for women and the honor camp, if there is an insufficient number to be heard on a monthly basis. In this event those inmates scheduled for a hearing in the second month will have their hearing moved to the first month.

(3) Scheduling of parole hearings.

(A) An inmate will be eligible for a parole hearing when he has served one year or one-third of his sentence, in accordance with the following schedule:

1. Length of Sentence	No. Months To Be Served
2 years	6 months
3 years	8 months
4 years	10 months
5 years	12 months
6 years	14 months
7 years	16 months
8 years	18 months
9 years	20 months
10 years	22 months
11 years or over	24 months

2. An inmate will receive his first written notice from the parole board within about thirty (30) days after he has been assigned to an institution by the division of classification and assignment. This notice will inform him of the month and year in which his parole hearing will be held. He will be notified of the exact date forty-five (45) days prior to the hearing.

3. An inmate may request that his parole hearing be scheduled for a later date. A request for a set-back of less than six months will not be accepted by the board.

4. After an inmate receives his notice of parole hearing, if he has further questions he should contact his institutional parole officer. If he does not receive a satisfactory answer, he should direct his question or request in writing to the parole board.

5. Inmates with sentences of six (6) years or more must make a written request to the board if they desire a parole hearing as set out in 13 CSR 80-2.010(3)(A) 1.

(B) An inmate need not make an application for a parole hearing, since he will be automatically scheduled by the parole board in accordance with the schedule in paragraph (3)(A)1. of this rule. There will be only two exceptions:

1. The first will be when an inmate is serving consecutive sentences. After he is heard on his first sentence, if he wishes to have a parole hearing on subsequent sentences, he will have to make written application for this hearing. Otherwise his case will be reviewed by the board at the expiration of each consecutive sentence as set out in 13 CSR 80-2.020(2)(B).

2. The second will be when an inmate has been convicted of a felony where a dangerous or deadly weapon

is used and is guilty under the law of "armed criminal action" his parole hearing will be as follows:

A. First conviction of "armed criminal action" a parole hearing will be held once three calendar years have been served on the sentence.

B. Second conviction of "armed criminal action" a parole hearing will be held once five calendar years have been served on the sentence.

C. Third conviction of "armed criminal action" a parole hearing will be held once ten calendar years have been served on the sentence.

(C) Jail time as granted by the sentencing judge is deducted from the sentence in the scheduling of the hearing date.

(D) A serious conduct violation prior to the hearing date will not affect the date of the hearing.

(E) If an inmate has not been granted a parole hearing before escaping from custody he will be scheduled for a hearing after he serves 2/3rds of his sentence or two (2) years, whichever is less.

(F) An inmate who has a court action pending will be given a parole hearing at the normally scheduled time.

(4) Representative allowed for parole hearings.

(A) An inmate may have a person of his choice at the hearing. The function of this representative shall be to offer a statement at the conclusion of the interview of the inmate and to provide such additional information as the hearing panel shall request.

1. Other inmates may not be present at the hearing.

2. Interested parties who oppose parole may select a representative to appear and offer a statement.

3. The hearing panel shall limit or exclude any irrelevant or repetitious statement.

(B) It is not at all necessary that an inmate have a representative at the hearing.

(5) The factors which determine the parole board's decision at the time of the hearing:

(A) All decisions of the parole board will be based upon the inmate's total situation, taking into account the board's two-fold responsibility of the protection of society and to offer the inmate maximum assistance towards his rehabilitation.

(B) The most important factors to be considered by the parole board in determining readiness for parole release will be:

1. the type of crime and the length of sentence;

2. the number of previous offenses and the circumstances pertaining thereto;

3. the inmate's attitude toward society and toward himself. The parole board believes that before an inmate is released on parole there must be evidence of a change in his attitude.

4. the inmate's personal and family history before commitment to the institution;

5. the inmate's past and present capabilities, habits and emotional stability;

6. the inmate's progress and behavior during the period of confinement. What the inmate has done to improve himself academically and vocationally will be taken into

account, as well as whether he has taken advantage of the various programs available in the institution to better himself, and whether he has adjusted to the rules governing the institution;

7. the inmate's plans for his future and whether his goals and ambitions are realistic for him; and

8. the effect of the inmate's release upon the community in which he will live and work, and the community's willingness to accept him back into free society.

(6) The procedure which is followed at the time of the parole hearing is:

(A) the inmate will appear by himself, in person, before the parole board;

(B) the delegates will appear before the parole board immediately following the inmate's hearing. The inmate will not personally be present when the delegates appear;

(C) The hearing shall not be open to the public, and the records of all such hearings shall be treated as confidential and not be open to inspection by the inmate concerned, his representative or any other unauthorized persons.

13 CSR 80-2.020 Possible Board Decisions Following a Parole Hearing

PURPOSE: There are several possible decisions the board can make following the initial parole hearing. This rule sets forth the possible decisions and what they mean.

(1) The parole board will reach a decision within ten (10) working days from the date of the hearing, and the inmate will receive a written notice of the board's action as soon as the notice can be prepared and delivered.

All decisions of the parole board are determined by a majority vote of the board.

(2) Any one or several of the following decisions will be made:

(A) A denial of further parole consideration. The reasons may include, but are not limited to the following, with further specification where appropriate:

1. Release at this time would depreciate the seriousness of the offense committed and would thus be incompatible with the welfare of society.

2. There does not appear to be a reasonable probability at this time that the inmate would live and remain at liberty without violating the law.

3. The inmate has (a serious) (repeated) disciplinary infraction(s) in the institution.

4. Additional institutional treatment is required to enhance the inmate's capacity to lead a law-abiding life.

(B) A set-back for further parole consideration at a later date. A set-back or a continuance usually will not be longer than one year. However, in some instances, particularly those inmates serving lengthy sentences, a set-back may be up to a maximum of five years. The reasons for a set-back or continuance may be the same as for denial as set out in subsection (2) (A) of this rule.

1. This set-back is for a review at the designated later time, and means that the board will review the inmate file during the month and year indicated on the notification of board decision form.

2. The inmate does not personally appear before the parole board, but he is interviewed by an institutional parole officer prior to the review. The institutional parole officer's report is available to the board.

3. At the first of the month of the review all such files are taken to the parole board. Each board member studies the information in the file and writes his decision.

4. The inmate will receive a notification of the board's decision, and this will normally reach the inmate at some time during the month of the review.

5. Any person wishing to appear before the board in behalf of an inmate may do so by writing to the board for a specific appointment. Such appointments should be made prior to the first day of the review month.

(C) The board may request a number of different kinds of investigation reports. These may include field investigations, institutional investigations, psychological and/or psychiatric evaluations.

(D) The board may request the inmate's authorization to obtain any medical, psychological and/or psychiatric evaluations that may have been made in the past.

(E) The board may request the inmate to submit a home and employment plan. In this instance, he will be contacted and assisted by the institutional parole officer. The board may place an inmate on parole planning, which means that instead of receiving home and employment papers right away, the institutional parole officer and the inmate will work together in order to develop a parole release plan that will be acceptable to the board.

1. The home may be with members of the family, a half-way house, or through any recognized social agency that will agree to accept the inmate, or any reputable rooming house hotel, etc.

2. Employment may be offered to the inmate by any legitimate employer. Under some circumstances the board may approve self-employment. The job must provide

steady employment and earnings adequate to meet the needs of the inmate and support his dependents. The board would also approve in lieu of employment acceptable school program.

3. In some situations the requirement of an employment offer may be waived by the parole board. This would include such things as old age, serious illness, physical incapacity, going into a training or apprenticeship program to obtain or better develop a job skill or schooling. In any of these kinds of situations the board will require assurance that the treatment, care and needs of the inmate will be adequately provided for.

(F) After the case has been evaluated by the parole board, the inmate will be notified in writing as to the board's decision.

(G) Inmates who are serving long sentences and have received several continuances or set-backs, shall be scheduled for a personal parole hearing before the parole board at least once every five (5) years following their first parole hearing.

(H) If an inmate has had a parole hearing and escapes after the hearing the board shall schedule him for a parole review at any time within one year from the month of his return from escape.

(3) An inmate may appeal a board decision. The appeal must be in writing on the forms provided and filed within thirty (30) days after the decision on which the appeal is based. The appeal shall be considered by at least two members of the board and the inmate will be advised of their decision within thirty (30) days. If no appeal is filed within thirty (30) days of the entry of the original decision the decision shall stand as final. Appeals will be based only upon the following grounds:

(A) The reasons given for denial or continuance do not support the decision.

(B) There was significant information in existence but was not known to the hearing panel at the time of the hearing.

13 CSR 80-2.030 Release on Parole

PURPOSE: There are different circumstances under which a parole may be granted, certain requirements to be met before parole can be granted, and certain restrictions on the length of time to be served on parole.

(1) There are certain requirements necessary before the board can grant a parole release to any inmate.

(A) The board must hold a parole hearing with the inmate present prior to parole release.

(B) No inmate will be released on parole until his proposed release plan has been investigated.

(C) The conditions of parole will be explained to each inmate, and he will be furnished a copy of the conditions in a booklet entitled, Conditions of Parole.

(2) An inmate with a detainer placed against him by another authority can be granted a parole.

(A) The board will consider parole to a detainer for confinement in some other jurisdiction, either in Missouri or another state.

(B) The board will consider granting a parole to be served concurrently with the parole of another paroling authority.

(C) The board will consider release to an untried detainer only if an acceptable and approved supervision plan is available for the inmate. This is in the event the inmate

is not convicted on the untried detainer, or is given probation by the court in event of conviction.

(3) The board will consider parole for medical reasons when they have a specific recommendation from a competent medical, psychiatric or psychological practitioner for the treatment, care or custody of inmates who have serious physical, mental or emotional problems, and the board can determine that the inmate will be able to receive proper care outside of the institution.

(A) An inmate granted a medical parole will, as far as possible, be required to comply with all the conditions of parole, and will receive field supervision the same as any other parolee.

(B) A medical parole may be granted for specific purpose of special treatment. Upon recovery, or at any time, the inmate shall be subject to return to the institution or any other disposition the board may deem appropriate in his case.

(4) The board may grant parole regardless of various actions taken by the inmate or the institution while he is confined.

(A) Any court action pending in regard to an inmate's case will not in itself prohibit favorable parole release consideration.

(B) Conduct violations within the institution while an inmate is pending parole release will be given individual attention by the parole board, and will depend a great deal on the seriousness of the conduct violation. The board can continue with plans for parole release, cancel further parole consideration, or make any other decision as set out in 13 CSR 80-2.020 (2).

(C) An inmate with consecutive sentences may be granted parole while he is serving on the first sentence or any consecutive sentences. If there is still one or more consecutive sentences to be served at the time of parole, orders of parole will also be issued on these sentences, and the inmate will serve them consecutively while on parole.

(5) There are certain statutory requirements and board rules regarding time served on parole and attendant matters.

(A) Any inmate released on parole will be subject to supervision until he has completed 3/4ths of his sentence. An inmate serving a sentence of life, or whose 3/4ths date would exceed five (5) years will be considered for a recommendation for commutation of his sentence after the successful completion of five (5) years under supervision. This is not automatic, and the sentence cannot be commuted until the governor has approved and signed a commutation of sentence. Those individuals sentenced under section 195.221 RSMo (Supp. 1973) for selling, giving, or delivering a controlled substance are compelled to serve the full amount of their sentence on parole plus an additional five (5) years. None of this term of parole can be shortened by commutation.

(B) Usually time served on parole counts as time served on the sentence. There are two exceptions.

1. Parolees who abscond from supervision are not given credit for the time served while they are on absconder status.

2. Parolees who violate parole and receive a new sentence to a correctional institution outside the Missouri division of corrections will not be given credit on their parole for the time served under the new conviction.

(6) There are provisions for the restoration of any civil rights lost at the time of conviction.

(A) The statutes provide that first offenders will be issued a certificate of restoration of civil rights at the time they are issued their discharge from parole. Section 216.355 (3) RSMo (1969).

(B) If a parolee is not serving parole on a first conviction, a period of two years must elapse between his discharge from parole (or his discharge from the institution without benefit of parole), and then make application to the board for restoration of civil rights. The applications can be obtained from the board's central office or any of the various district offices located in the cities listed in 13 CSR 80-3.010 (10).